No. 83-435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE WICHITA BOARD OF TRADE, ET AL.,

Petitioners,

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

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Dated: October, 1983

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QUESTION PRESENTED

Was the holding by the Court of Appeals that the district court lacked jurisdiction to order refunds of railroad rates collected during the period when this Court's earlier stay order was in effect consistent with the terms of the stay order, this Court's opinion in *Atchison, Topeka and Santa Fe Railroad Company* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), and this Court's summary remand order in *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade*, 433 U.S. 902 (1977), where the rates, although initially approved but later ordered prospectively cancelled by the Interstate Commerce Commission ("Commission"), were never found by the Commission to be unreasonable with respect to the period involved, and where the Commission itself twice expressly refused to require refunds?

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STATEMENT

This is the third time this matter, involving new charges proposed by the respondent railroads[1] for in-transit grain inspection service, has come before this Court. On both prior occasions, this Court held that the three-judge Kansas district court convened to review the Commission's initial decision approving the inspection charges (*Inspection In Transit, Grain and Grain Products*, 339 I.C.C. 364 (1971), *aff'd* 340 I.C.C. 69 (1971)), exceeded its jurisdiction in attempting to contravene Commission decisions authorizing the railroads to collect and keep the charges. *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade*, 412 U.S. 800,

1. The respondents on whose behalf this brief in opposition is filed are railroads operating in the Western District of the United States.

818-827 (1973) (*Wichita* I); *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade*, 433 U.S. 902 (1977) (*Wichita* II).[2]

In its original judgment on review of the Commission's 1971 decision approving the inspection charges, the three-judge Kansas court remanded the matter to the Commission for further proceedings and "suspended" (enjoined) the charges which then had been in effect for over a year. *Wichita Board of Trade* v. *United States*, 352 F. Supp. 365 (D. Kan. 1972) (App. A22-A29). The railroads appealed to this Court and, on July 7, 1972, this Court entered an order staying the district court's judgment pending determination of the railroads' appeal. *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade*, 409 U.S. 801 (App. A63). As a condition to its stay, the Court required the railroads to keep account of all amounts received during the existence of the stay by reason of the inspection charges, and:

> In the event the order suspending the charges is affirmed by this Court, refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make application for refunds. In the event this Court's action should be other than an affirmance of the results reached by the District Court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate. (409 U.S. 801; App. A63.)

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2. *Wichita* I is reproduced in the appendix to the petition for writ of certiorari herein at pp. A30-A62. *Wichita* II is reproduced in the appendix at p. A153. Unless otherwise indicated, appendix references in this brief (e.g., "App. A1") are to the appendix attached to the petition for writ of certiorari.

On June 18, 1973, this Court entered its opinion and order on the merits of the railroads' appeal (*Wichita* I), affirming the district court's remand of the case to the Commission but reversing the district court's suspension of the charges. In sustaining the remand of the case to the Commission, this Court emphasized the Commission's broad discretion to adjudicate the lawfulness of the inspection charges and, if it found the charges unjustified, to determine what steps, if any, should be taken with respect to charges already collected by the railroads pursuant to their tariffs as initially approved by the Commission. The Court noted that the Commission might determine on remand that some further steps (such as ordering refunds) should be taken to protect the shippers, or that no further action is necessary in light of the availability to shippers of separate actions for reparations (412 U.S. at 823-824, 826; App. A51, A53).

Finally, footnote one to the Court's opinion in *Wichita* I, 412 U.S. at 802, App. A31, provided as follows with respect to the Court's earlier stay of the district court's judgment:

> We have previously stayed the judgment of the District Court on condition that appellant railroads keep account of the amounts received from in-transit charges, 409 U.S. 801(1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts.

On remand, the Commission found the proposed in-transit grain inspection charges not shown to be just and reasonable and otherwise lawful, and ordered the railroads' tariffs containing the charges canceled *prospectively*. *Inspection In Transit, Grain and Grain Products*, 349 I.C.C. 89 (1975) (App. A117-A132). With respect to other relief, such as

refunding of charges already collected by the railroads, the Commission's decision provided (App. A122):

> Of course, should relief in addition to that which is provided in this report and order be desired by protestants, action under section 13(1) of the [Interstate Commerce] Act must be commenced.

No party sought judicial review of the Commission's 1975 decision on remand, and the inspection charge tariffs were canceled effective March 28, 1975.

Subsequently, refunds of inspection charges collected by the railroads during all or a portion of the nearly four-year period when the tariffs were in effect were sought in three different ways. First, the Commodity Credit Corporation of the United States Department of Agriculture as well as a number of other grain shippers filed complaints with the Commission under §13(1) of the Interstate Commerce Act[3] seeking refunds of inspection charges collected during the entire period when the tariffs were in effect, including the period from July 7, 1972 to June 18, 1973 when this Court's stay order was in effect. Relief on the complaints was ultimately denied on the merits by the Commission.[4]

Second, the Secretary of Agriculture of the United States filed a motion with the Commission seeking an order requiring the railroads to refund all of the inspection charges collected during the entire four-year period when the inspection

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3. 49 U.S.C.§13(1). In 1978, the Interstate Commerce Act was revised and recodified without substantive change as 49 U.S.C. §10101, *et seq.* The substance of former §13(1) now appears at 49 U.S.C. §10701.

4. Commodity Credit Corporation v. Kansas City Southern Railway Company, et al., Docket No. 36512 (Decision by the Commission, Division 2, served May 12, 1981. This decision is reproduced as Appendix A to this brief.

charge tariffs were in effect.[5] This motion was summarily denied by the Commission (App. A171), whereupon the Secretary filed an action to review the Commission's denial order in the United States Court of Appeals for the District of Columbia Circuit. That court remanded the case to the Commission for further findings but refused to interfere with the Commission's recognized discretionary power under §15(7) of the Interstate Commerce Act to require or not to require refunds.[6] *Secretary of Agriculture* v. *Interstate Commerce Commission* 551 F.2d 1329 (D.C. Cir. 1977)(App. A174-A177).

Finally, the petitioners herein filed a motion in the Kansas district court requesting it to order refunds of inspection charges collected by the railroads during the period from July 7, 1972 to June 18, 1973, when this Court's 1972 stay order (App. A63) was in effect. The motion was granted by order of the three-judge district court entered February 23, 1977 (App. A155-A167). That order, however, was subse-

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5. Notwithstanding the implication at pp. 6-7 of the petition for writ of certiorari that the period covered by this Court's 1972 stay order was excluded from the Secretary's motion, the Secretary's motion in fact explicitly requested that the railroads be required to refund "all charges" for in-transit grain inspection "which were collected by the respondent railroads between May 4, 1971 and March 28, 1975". This is the entire period when the tariffs containing the inspection charges were in effect. A copy of the relevant portion of the Secretary's motion for refunds is attached to this brief as Appendix B.

6. The Commission proceeding to determine the lawfulness of the inspection charges was instituted under 49 U.S.C. §15(7). Section 15(7) was amended effective February 5, 1976 (long after the grain inspection charge proceeding was instituted before the Commission) by Public Law 94-210, the Railroad Revitalization and Regulatory Reform Act of 1976. From 1976 until 1978, the amended language as it pertained to rate changes proposed by rail carriers appeared as 49 U.S.C. §15(8). As a result of the 1978 recodification, the amended language now appears as 49 U.S.C. §10707. Under the amendments, refunds are now mandatory if the Commission concludes that proposed railroad rates that have previously become effective must be canceled. See 49 U.S.C. §10707(d)(1).

quently vacated by this Court's order in *Wichita* II, and the case remanded

> with directions to remand case to the Interstate Commerce Commission for further consideration in connection with its reconsideration of *Secretary of Agriculture* v. *Interstate Commerce Commission*, No. 76-1026 (CADC Mar. 11, 1977), on remand from the United States Court of Appeals for the District of Columbia Circuit. (App. A153.)

In February of 1979, the Commission issued its decision on remand from the District of Columbia Court of Appeals and from the Kansas district court (pursuant to this Court's direction in *Wichita* II) concerning the question of who, if anyone, is entitled to general refunds and for what period. *Inspection In Transit, Grain and Grain Products*, 359 I.C.C. 624 (App. A133-A152). In this decision, the Commission thoroughly explored both the legal justification for refunds and the "equities of restitution" as well as the question whether there was any reason why the one-year period covered by this Court's 1972 stay order warranted any different treatment than the remainder of the four-year period when the involved tariffs were in effect. The Commission concluded that there was no reason for different treatment of the stay period, and it went on to deny general refunds for any period although it set forth explicit guidelines under which shippers (including the petitioners herein who were parties to the Commission proceeding and had also sought refunds before the Commission) could seek and obtain refunds pursuant to §13(1) complaints.[7]

No party to the Commission proceeding sought judicial review of the Commission's 1979 decision denying general refunds. Rather, in March of 1979, the petitioners herein filed

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7. As indicated in footnote 5, *ante*, a number of §13(1) complaints seeking refunds were filed with the Commission, and the Commission ultimately concluded that the complainants had failed to establish that their particular situations warranted refunds. See Appendix A attached to this brief.

a "renewal of earlier motion for order requiring refunds" of inspection charges collected during the period covered by this Court's 1972 stay order in the Kansas district court. In May of 1982, a member of the original three-judge panel now sitting as a single district judge[8] issued an order granting the petitioners' renewed motion for refunds, and ordered the railroads to file a written accounting of the charges collected during this Court's stay period and to tender therewith into the registry of the courts the amount of money so collected (about $3 million) (App. A12-A21). The railroads appealed, and on April 28, 1983, the United States Court of Appeals for the Tenth Circuit reversed the district court's second refund order. *Wichita Board of Trade* v. *United States*, 706 F. 2d 1067 (App. A1-A11), *rehearing den.* 10th Cir. June 16, 1983 (App. A169-A170). This petition for writ of certiorari seeking review of the Tenth Circuit's decision followed.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals involves a procedurally unique set of circumstances arising out of a Commission rate-reasonableness determination that has twice before led to appeals to this Court. The court of appeals properly held that the district court lacked jurisdiction to order refunds in view of this Court's prior decisions holding that the refund

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8. The railroads take no position on the question (arising from *dictum* in the court of appeals' opinion below) whether the district court's second refund order was properly entered by a single district judge rather than the three-judge panel by whom the case was originally heard. We note, however, that a direct appeal to the Supreme Court lies only from decisions actually made by a three-judge court, and that an appeal from a decision which should have been made by such a court but which was actually made by a single judge lies only to the court of appeals. *McLucas* v. *DeChamplain*, 421 U.S. 21, 29-30 (1975); *Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1 (1971) (*per curiam*); see, also, *Hamilton* v. *Nakai*, 453 F. 2d 152, 161 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972). Thus, regardless of whether the district court's second refund order was properly entered by a single district judge, the railroads' appeal was properly taken to the Tenth Circuit Court of Appeals.

question is committed to the Commission's primary jurisdiction and twice vacating earlier orders of the district court purporting to overrule Commission determinations that the railroads were entitled to collect and keep the inspection charges.

I. The Holding By the Court of Appeals That the District Court Lacked Jurisdiction to Order Refunds in the Unique Circumstances of This Case Accords Squarely with This Court's Prior Decisions in *Wichita* I and *Wichita* II.

In *Wichita* I, this Court recognized the discretionary nature of the Commission's power to order refunds in proceedings arising, as this one did, under §15(7) of the Interstate Commerce Act prior to its amendment in 1976:

> Congress did provide protection to shippers for the period after the rates go into effect. The Commission may require the carriers to keep detailed accounts of the income received as a result of the increase. If the increase is ultimately found unjustified, the Commission may order a refund. 49 U.S.C. §15(7). Even if the Commission does not do so in a suspension proceeding, the shippers may recover reparations under some circumstances. 49 U.S.C. §§8, 9.

(412 U.S. at 823-824; App. A51). See, also, 412 U.S. at 826 (App. A53), where the Court noted that the availability of actions for reparations may adequately protect shippers from irreparable damage, but that "[t]he Commission may determine on remand that some further steps must be taken to protect the shippers." The Commission's discretion under §15(7) to order or not to order refunds of the grain inspection charges in issue was reaffirmed in *Secretary of Agriculture* v. *Interstate Commerce Commission*, 551 F. 2d 1329 (D.C. Cir. 1977), which involved judicial review of the Commission's decision not to order across-the-board refunds of the inspection charges collected by the railroads prior to the Commission's determination, on remand from the Kansas district

court, that the charges should be canceled *in futuro*. As the District of Columbia Court of Appeals held:

> [T]he Supreme Court has recognized that the Commission's authority to order a refund under §15(7) is discretionary, *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board, supra*, note 1, 412 U.S. at 817-826, esp. at 824 [footnote omitted]. There is no reason to believe that use of a discretionary word was inadvertent. Since §15(7) contains "shall" six times and "may" five times, Congress appears to have deliberately distinguished mandatory and discretionary duties. (551 F. 2d at pp. 1330-1331; App. A176.)

This holding by the District of Columbia Court of Appeals was implicitly accepted by this Court in *Wichita* II, in which the Court vacated the Kansas district court's first refund order with directions to remand the refund issue to the Commission "for further reconsideration in connection with its reconsideration of *Secretary of Agriculture* v. *Interstate Commerce Commission* ... on remand from the United States Court of Appeals for the Tenth Circuit" (A153).

In considering the propriety of the district court's second refund order (which was reversed by the Tenth Circuit's decision under review herein), it is important to consider the context in which that order was issued. The order attempted to dispose of funds which purportedly were under the equitable jurisdiction of the district court as a result of the keep-account requirement of this Court's 1972 stay order and footnote one to this Court's *Wichita* I opinion — but in a manner completely inconsistent with the Commission's 1979 decision (App. A133-A152) holding that general refunds were inappropriate and that the railroads were entitled to keep the charges collected while the involved tariffs were lawfully in effect.

The keep-account requirement of this Court's 1972 stay order directed the railroads to make automatic refunds "[i]n the event the order [of the Kansas district court] suspending

the charges is affirmed by this Court." (App. A63) However, the stay order went on to state that

> "[I]n the event this Court's action should be other than an affirmance of the results reached by the District Court, this Court may make such further order covering the disposition of the aforesaid amounts as the Court may deem appropriate" (*Id.*).

In its decision on the merits of the petitioners' appeal from the Kansas district court's initial order suspending the charges, this Court held that the district court had indeed exceeded its authority by suspending the charges (*Wichita* I, 412 U.S. at 818-827; App. A45-A55). This Court thus did *not* affirm the district court's order suspending the charges, in which case refunds would have followed automatically under the terms of the stay order. Rather, its action clearly was "other than an affirmance of the results reached by the district court" in suspending the charges.

Since this Court clearly held in *Wichita* I that in the circumstances of this case it was for the Commission and not the courts to set aside ("suspend") the *tariffs* containing the inspection charges (as opposed to the Commission's *order* finding the charges to be just and reasonable), the district court's first refund order requiring the railroad to refund all charges collected during the stay period was patently inconsistent with the fundamental purpose of this Court's 1972 stay order and with its *Wichita* I opinion. This Court clearly so recognized in *Wichita* II, in which (without even waiting for full briefing and argument) it summarily vacated the district court's first refund order and directed that the case (which, at that stage, involved only the question of the propriety of refunds of inspection charges collected during the period covered by this Court's 1972 stay order) be remanded to the Commission (A153).

Petitioners attempt to avoid the unambiguous and logical meaning of this Court's *Wichita* II order by reference to *United States* v. *Morgan*, 313 U.S. 409 (1941). In particular,

the petitioners assert that under *Morgan* the district court had jurisdiction to dispose of the funds accumulated under the keep-account requirement of the Court's 1972 stay order according to equitable principles in view of the Commission's 1975 decision on remand pursuant to *Wichita I* in which the Commission held that the inspection charges were not shown to be just and reasonable and ordered them canceled.

The petitioners' reliance on *Morgan* continues to be misplaced. [9] In the first place, *Morgan* is distinguishable because it involved a different statutory scheme, the Packers and Stockyards Act (7 U.S.C. §§181-229), which contained no provision comparable to §15(7) of the Interstate Commerce Act lodging discretionary power in the agency to require refunds. In addition, in *Morgan* the agency's initial decision *disapproved* increased rates and was enjoined at the instance of those collecting the rates, while here the Commission's initial decision *approved* increased rates and was enjoined at the instance of those paying the rates. Finally, as the court below recognized (App. A10), the difference between the higher and lower rates involved in *Morgan* was paid directly into the court, whereas here the railroads kept the difference subject only to the conditions of this Court's 1972 stay order.

Even if the *Morgan* holding were applicable to this case, however, that holding does not authorize the Kansas district court to reject the Commission's decision and to authorize refunds where the Commission indicated they should be denied. In *Morgan*, certain stockyard companies sought judicial review of an order of the Secretary of Agriculture reducing certain stockyard rates pursuant to the Packers and Stockyards Act. The stockyard companies obtained a tempo-

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9. The petitioners relied heavily on *Morgan* in defending the district court's first refund order, which was the subject of this Court's order in *Wichita* II. Obviously, this Court did not consider *Morgan* apposite since it summarily reversed the district court's first refund order and directed that the propriety of refunds of inspection charges collected during the period covered by the 1972 stay order be remanded to the Commission's primary jurisdiction.

rary injunction restraining enforcement of the Secretary's order; the injunction required deposit of the resulting higher rates with the reviewing district court pending completion of the judicial review proceeding. This Court initially set aside the Secretary's order on procedural grounds and remanded the case, *Morgan* v. *United States*, 304 U.S. 1 (1938). On remand, the Secretary reopened the proceeding to reconsider the reasonableness of the higher rates. While the proceeding before the Secretary was pending, the reviewing district court granted a motion by the stockyard companies to distribute the funds paid into the court among them. In *United States* v. *Morgan*, *supra*, this Court reversed the district court's refund order, holding that while a reviewing court of equity has authority to dispose of a fund paid into court pursuant to its own direction (307 U.S. at pp. 191-197), the district court should have awaited the outcome of the proceedings pending before the Secretary so that it would have an appropriate basis for distributing the funds (pp. 197-198). The Court expressly held that the Secretary's determination "will afford the appropriate basis for action in the district court in making distribution of the fund in its custody" (p. 198).

Thus, although it involved an entirely different statutory scheme, *Morgan* required the Kansas district court to refrain from substituting its judgment on the refund question for that of the Commission. This Court clearly so held by summarily vacating the district court's first refund order in *Wichita* II.

The petitioners attempt to avoid the logical implication of the *Morgan* decision by arguing that under this Court's remand order in *Wichita* II the district court was merely required to "consider" the Commission's decision on remand of the refund question, but was not bound by that decision because it retained equitable power to dispose of the funds accumulated by the railroads under the terms of this Court's 1972 stay order. However, this theory ignores the fact that in its 1975 decision on remand as a result of this Court's *Wichita* I decision, the Commission expressly refrained from granting

any relief other than prospective cancellation of the inspection charge tariffs after holding that the charges were not shown to be just and reasonable. That decision — which determined the inspection charges to be "unlawful" to the extent that the railroads could no longer collect them in the future — of course had already been issued when this Court entered its remand order in *Wichita* II. There simply is no logical reason why the Commission's issuance of a second decision (its 1979 decision on remand pursuant to *Wichita* II and *Secretary of Agriculture* v. *Interstate Commerce Commission, supra*) reaffirming its earlier decision not to require refunds compels, or even permits, a conclusion different from that reached by this Court in *Wichita* II. Under *Wichita* II, the question of whether the railroads should be required to refund inspection charges collected during the period covered by this Court's 1972 stay order clearly is committed to the sole discretion of the Commission.

II. This Is Not a Reparations Case Over Which the District Court Had Jurisdiction Under Sections 8 and 9 of the Interstate Commerce Act.

At pages 13-17 of their petition for writ of certiorari, petitioners argue that in reality this is nothing more than a reparations case, and that the court of appeals erred in concluding that the refund question is committed to the primary jurisdiction of the Commission because, under §§8 and 9 of the Interstate Commerce Act (49 U.S.C. §§8, 9),[10] shippers may commence an action to recover damages sustained by reason of an unlawful rate collected by a railroad in a federal district court in the first instance. This argument is highly misleading, because it erroneously implies that the Commission has determined the inspection charges to be "unlawful" for all purposes, including refunds.

The fact is that, in the circumstances of this case, refunding of grain inspection charges collected by the railroads does not amount to the same thing as reparations

10. Recodified, in 1978, as 49 U.S.C. §§11705(b)(2) and 11705(c)(1).

under §§8 and 9. An action for reparations lies only where there has been a substantive violation of the Interstate Commerce Act, such that a rail carrier has unlawfully collected rates as a result of the violation. Here, however, the railroads did not collect the inspection charges in violation of any provision of the Interstate Commerce Act; rather, they collected the charges in reliance on the Commission's initial 1971 decision finding them just, reasonable and otherwise lawful. The railroads continued to collect the charges until they were orderd canceled by the Commission in 1975 in its decision on remand pursuant to *Wichita* I (App. A117-A132). The Commission has made no finding that the inspection charges were unreasonable or otherwise unlawful during the period (including the period covered by this Court's 1972 stay order) when the tariffs containing the charges were in effect. In its 1975 decision, the Commission did *not* find the tariffs to have been unreasonable while they were in effect, or that the railroads acted improperly in collecting the charges pursuant to the tariffs; it merely held that due to the railroads' failure to adduce certain evidence (not previously required of them) they had failed to carry their burden of proof and, thus, that the charges were not shown to be just, reasonable and otherwise lawful and had to be canceled *for the future only*.

This is an important distinction for purposes of the availability of a judicial cause of action for reparations. There is no difference between a Commission finding that rates are "unreasonable" and a Commission finding that rates are "not shown to be just and reasonable" in terms of whether the rates may be lawfully maintained *in the future*. But there is a clear distinction between the two findings in terms of whether the rates were unlawful *in the past* when they were collected pursuant to tariffs properly on file with the Commission. This Court recognized the distinction in footnote 9 to its *Wichita* I opinion, 412 U.S. at 914 (App. A40):

> If the Commission finds [on remand] that the proposed rates are unreasonable, rather than that the railroad failed to carry their burden of proof,

> that finding might be conclusive in a subsequent proceeding [for reparations].

The distinction was also recognized in *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212, 222 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), where the court held that a Commission finding that a rate had not been shown to be reasonable was not a finding of any substantive violation of the Interstate Commerce Act:

> In holding that the tariffs are unlawful, we are not expressing any affirmative judgment that the rates embodied in them are in any substantive way violative of the Act — e.g., that they are unreasonably high or discriminatory. Such a judgment lies solely within the province of the Interstate Commerce Commission. Nor does this holding imply that the tariffs were unlawful in any sense whatsoever *prior* to the Commission's final order. ... The conclusion that the tariffs were unlawful is restricted to the sense that by virtue of the Commission's cancellation order, as it operated prospectively, the carriers no longer had the right to maintain that particular tariff; maintenance of the tariff in violation of the order was unlawful. (Emphasis the court's.)

Moreover, if the petitioners' reparations theory were correct, this Court would not have summarily reversed the district court's first refund order in *Wichita* II, which was decided well after the Commission's 1975 decision finding the inspection charges not shown to be just and reasonable and ordering them canceled.

Finally, the Commission itself recognized the distinction in its 1979 decision on remand of the refund issue (App. A133-A152). Although the Commission there found that the issue of whether the inspection charges were just and reasonable was final for purposes of continuing the charges in effect (App. A136), it specifically recognized the distinction

between a finding of "unjust and unreasonable" and a finding of "not shown to be just and reasonable" with respect to its discretion under §15(7) to order refunds of rates collected when the underlying tariffs were in effect. (App. A140-A141).

As the foregoing discussion indicates, this case does not involve reparation of rates determined by the Commission to have been unlawful when they were collected, but rather discretionary refunds arising out of a §15(7) proceeding in which the Commission has not held the involved rates to have been unreasonable, and in addition has specifically exercised its discretion under §15(7) by holding that refunds should not be required. Under both *Wichita* I and *Wichita* II, the courts clearly lack jurisdiction to disregard the Commission's decisions by ordering refunds under the guise of the reparations statute.

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this case are insubstantial, and that the holding of the court of appeals squarely accords with this Court's prior decisions involving this subject matter. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

INTERSTATE COMMERCE COMMISSION
DECISION
No. 36512
COMMODITY CREDIT CORPORATION[1]
v.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.

Decided: May 5, 1981 Service Date: May 12, 1971

Complainants Commodity Credit Corporation and Farmers Union Grain Terminal Association have appealed the initial decision served October 28, 1980. The railroads have replied. We affirm the initial decision.

These proceedings involve charges levied by the Western Railroads for stopping and setting aside cars so that grain may be inspected on its way to market, a service previously performed under the line-haul rate. After much litigation, which is described in detail in the initial decision, the Commission found the combined line-haul rates and in-transit inspection charges not shown to be just and reasonable.

In a subsequent decision, *Inspection in Transit, Grain and Grain Products*, 359 I.C.C. 624 (1979), the Commission found that a blanket refund order for the period in which the

1. The following dockets have been consolidated for disposition with this proceeding: No. 36207, same v. Chicago and Northwestern Transportation Company, et al.; No. 36310 (same title): No. 36353, same v. Burlington Northern, Inc., et al.; No. 36270, Farmland Industries, Inc. v. Missouri Pacific Railroad Company, et al., as well as Sub-Nos. 1 through 7 which name the Atchison, Topeka and Santa Fe Railway Co.; Burlington Northern, Inc.; Chicago, Milwaukee, St. Paul and Pacific Railway Co.; Chicago and Northwestern Transportation Co.; Missouri Pacific Railroad Co.; Norfolk and Western Railway Co.; and Union Pacific Railroad Co.; respectively, as defendants; No. 36250, Riceland Foods, Inc. v. Mississippi Export Railroad Co., et al.; and No. 36512 (Sub-No. 1), Penick & Ford v. The Chicago and Northwestern Transportation Co., et al.

special charges were in effect was not warranted under the circumstances of the case. However, the Commission also established criteria for consideration of individual claims for reparations under 49 U.S.C. 11701. Under these criteria, parties must show that, if refunds are ordered, they will only go, in full, to those who have actually borne the charges, and that the equities of a particular situation warrant refunds despite the general findings to the contrary. The relevant factors in the equity analysis included reliance by the carriers on the fact that the Commission had earlier permitted imposition of the special charge, the severe financial effect refunds would have on the railroad industry, the fact that many refunds would not go to the persons who had actually paid the charges, and the potential effect on rate innovation of an award of refunds under the circumstances. We also permitted the parties to comment generally on the appropriateness of these criteria.

Various parties submitted further statements concerning these issues. In the initial decision, the Administrative Law Judge found that complainants in the title and consolidated proceedings had not established that, on the equities, their factual situations deserved a result different from that reached in *Inspection in Transit*, *supra*, or that the reasoning applied in the decision did not apply to them or that in their individual circumstances it would be unfair for the carriers to retain the collected charges. The ALJ also found that they had failed to show that if refunds were ordered they would go, in full, to those who had actually borne the charge.

Preliminary Matters

In their reply statement the railroads state that the petitions for reconsideration do not comply with Rule 98 of the Commission's General Rules of Practice.[2] We agree that the

2. Defendants cite an outmoded version of Rule 98. See 45 Fed. Reg. 48,793 (1980). However, the modifications in Rule 98 do not materially affect defendant's argument.

Farmers Union Grain Terminal Association petition does not adequately detail the grounds for appeal, and will strike that petition.[3]

Discussion

Commodity Credit Corporation has raised essentially the same issues on appeal as were discussed in the initial decision. Complainant contends that the carriers are not entitled to rely on the prior decision, that the financial condition of the railroad industry affects the method of repayment rather than the necessity for it, that the 4R Act and the Staggers Rail Act of 1980 offset any possible chilling effect on rate innovation, and that the refunds would go to the entity that had borne the charges.

1. *Reliance.* Commodity Credit argues first that the rate was never found just and reasonable, and that therefore the rate should be considered as a proposed rate for the whole period in question. This argument is not convincing, as the fact that a rate is found not shown to be just and reasonable is not determinative of the appropriate remedy. In *Secretary of Agriculture of U.S.* v *I.C.C.*, 551 F.2d 1329 (D.C. Cir. 1977), which remanded this proceeding to us for further consideration of the refund issue, the court specifically found that under the circumstances of this case, refunds were discretionary rather than mandatory.[4]

Also, both *Inspection in Transit, supra*, and the initial decision discussed in detail the difference between a finding that a rate is unreasonable and a finding that a rate has not been shown just and reasonable. Commodity Credit has sub-

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3. As stated in the initial decision, the Association did not submit any further statement of facts or arguments as required by *Inspection in Transit, supra*, and by an unprinted decision of the Commission in Docket 36512, decided November 7, 1979. Thus the Association's ability to appeal would be limited in any case.

4. See also the discussion in *Inspection in Transit, supra*, at 628, and the cases cited therein.

mitted nothing in its petition to refute our discussion of this distinction.

Furthermore, that the distinction is not merely technical is well-illustrated by the circumstances of this proceeding. Not only are thousands of line-haul rates involved, but the rates themselves vary to a large degree.[5] Thus the burden of proof on the carriers was extremely difficult to carry. That the carriers were not able to prove that the thousands of rates plus the service charge were reasonable does not necessarily indicate that the rates were unreasonable or the individual shippers were actually harmed during the period that the charges were in effect. *Compare, Insulating Materials, Bet. Points in Official Terr.*, 364 I.C.C. 599, 601 (1981), where the Commission refused to award damages in an unreasonable practice case where specific harm was not shown.

Commodity Credit also argues that the carriers were not entitled to rely on our decision after the U.S. District Court for the District of Kansas enjoined the railroads from collecting the charges.[6] Although this order was vacated by the Supreme Court in *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973), Commodity Credit argues: (1) that the Supreme Court stated that the district court could have suspended the operation of the Commission's order and the railroads then could not have gained any benefit in a reparations proceeding from the purported Commission approval of the rates; and (2) that such suspension was implicit in the court order enjoining the carriers.

The short answer to this argument is that the district court did not in fact suspend the Commission's order. Furthermore, a reading of the *Wichita Board of Trade* decision as a whole does not suggest that the carriers should not have relied on our prior decisions. First, the Supreme Court in

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5. See discussion in *Inspection in Transit, Grain and Grain Products*, 349 I.C.C. 89 (1975).

6. *Wichita Board of Trade, et al. v. United States, et al.*, civil action No. W-4730 (U.S.D.C. Kansas, February 23, 1977).

remanding this case to us in *Wichita Board of Trade* by no means directed us to find the charges unlawful. Also, the Court stated that, absent a Commission finding of unreasonableness, the carriers are not precluded from implementing a new rate. Finally, the Court indicated that, under some circumstances, reparations are discretionary.

As stated, nothing in these statements expresses a Court expectation that the carriers would cancel the charges at issue prior to a Commission decision so ordering. Furthermore, particularly where circumstances suggest ultimate approval will be forthcoming, the carriers should not be expected to await the end of litigation before they implement business decisions. Here the charges were imposed to try to alleviate car shortages, a problem of continuing interest to the Commission. As discussed in the 1975 *Inspection in Transit* decision, the charges seemed to be achieving the desired effect. Not only was the goal desired by the Commission, but the Commission had already approved the charges in the prior decision. Under these circumstances, it was not unreasonable for the carriers to expect that the charge would ultimately be approved. After considering these circumstances, the *Wichita Board of Trade* decision, plus the additional factors discussed in the 1979 *Inspection in Transit* decision and in the initial decision, we affirm previous findings that the carriers reasonably relied upon prior Commission decisions.

2. *Financial Condition.* Citing *Root Glass Co.* v. *Evansville I. & T.H. Ry. Co.*, 178 I.C.C. 783, 784 (1931), and *Sinclair Prairie Oil Co.* v. *Fort Smith & W. Ry. Co.*, 222 I.C.C. 184, 185 (1937), Commodity Credit next argues that the financial condition of the railroads is no bar to an order for reparations. These cases are not controlling. First, neither involved a finding or rates not shown to be just and reasonable. Second, each was of limited impact on the railroad industry. *Sinclair Prairie*, for example, involved shipments of casing-head gasoline from Boley, Oklahoma to Meraus, Louisiana. In contrast, at issue here is the territory-wide rate structure for grain, one of the most significant commodities

for the carriers. As stated in the 1979 *Inspection in Transit* decision, *supra* at 359, the railroads comprise a mutually dependent network, and refunds which would seriously impede several important carriers could substantially affect the health of the industry. Commodity Credit has submitted nothing to rebut this finding.

Third, significant changes in regulatory policy have occurred since the cases cited by Commodity Credit were decided. In the Staggers Rail Act of 1980, for example, Congress in Section 2 that "earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements". One of the purposes of the Act therefore is "to reform Federal regulatory policy so as to preserve a . . . financially stable rail system."

Thus we have been specifically instructed by Congress to consider the effect of our decisions on the financial condition of the rail industry. The Staggers Act also required that we complete a proceeding to determine the adequacy of rail revenues. The results of that proceeding[7] indicate that only three carriers, none of which is a major grain hauler, can be considered revenue adequate. While these findings are not necessarily relevant to all of our proceedings, they do support our conclusions here that refunds could substantially affect the health of the rail industry.

3. Chilling Effect. The next argument reiterated by Commodity Credit is that the Staggers Act and the 4R Act have so improved opportunities for rate innovation that any chilling effect of refunds in this proceeding have been offset. We do not agree. First, neither of these acts gives complete rate-setting freedom to the railroads. Thus, it is not sufficient to theorize that, if refunds were awarded here, they could be recouped in total under new ratemaking provisions. Second, and most important, the implementation of legislation by

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7. Ex Parte No. 393, *Standards for Railroad Revenue Adequacy*, decision served March 30, 1981.

agencies can significantly affect the impact of the legislation on business. Our desire not to stifle rate innovation remains an important consideration.

4. Actually Bore Losses. Complainant's last argument is that it actually bore the losses claimed. Prior to the initial decision, defendants requested a hearing for the purpose of developing an adequate record on this issue. Since the complainant had not prevailed upon the other issue. Since the complainant had not prevailed upon the other issues, however, the Administrative Law Judge considered the necessity for further evidence to be moot, and dismissed the complaints. We likewise find no need for further discussion of this issue.

Conclusion

We affirm the initial decision including the finding that this proceeding will not significantly affect either the quality of the human environment or conservation of energy resources.

It is order:

The petition for reconsideration of Farmers Union Grain Terminal Association is struck.

The petition of Commodity Credit Corporation is denied.

The proceeding is discontinued.

By the Commission, Division 2, Commissioners Gresham, Trantum, and Alexis.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Appendix B

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Investigation and Suspension
Docket No. 8548

Inspection in Transit, Grain and Grain Products

MOTION FOR A REFUND ORDER UNDER SECTION 15(7) OF THE INTERSTATE COMMERCE ACT AND FOR OTHER AND FURTHER RELIEF

Comes now the Secretary of Agriculture of the United States, (Secretary), a protestant in this proceeding, and files this motion for a refund order under section 15(7) of the Interstate Commerce Act (49 U.S.C. 15(7)) and for other and further relief, regarding all charges for the first stop for in-transit inspection of grain and grain products at various points in the United States outside the eastern territory which were collected by the respondent railroads between May 4, 1971, and March 28, 1975. In support of said motion the Secretary directs the Commission's attention to the following facts.

1. By schedules filed to become effective on and after March 28, 1970, the Traffic Executive Association of Eastern Railroads, together with other rail publishing agents and individual rail carriers, proposed to establish new or increased charges for the first stop for in-transit inspection....

WHEREFORE, the Secretary of Agriculture as a protestant in this matter, moves this Commission to issue a refund order pursuant to section 15(7) of the Interstate Commerce Act regarding all charges for the first stop for in-transit inspection of grain and grain products at various points outside the eastern territory which were collected on shipments moving between May 4, 1971, and March 28, 1975, and for interest on the said amounts and for such other further relief as the Commission may deem appropriate.

Respectfully submitted by direction of the Secretary of Agriculture of the United States.

Mervin W. Kaye
Acting Director

RONALD W. HILL, Attorney

Food and Nutrition Division

Office of the General Counsel
UNITED STATES
DEPARTMENT OF
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